Supreme Court, U.S.
FILED

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No. _____

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In The

# Supreme Court of the United States

October Term, 1996

J.E. MERIT CONSTRUCTORS, INC.,

*Petitioner,*

v.

JOHN L. DAVIS,

*Respondent.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit**

## PETITION FOR WRIT OF CERTIORARI

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71 pp

## QUESTIONS PRESENTED FOR REVIEW

1. Whether, in this diversity case, this Court should grant the petition for certiorari, vacate the judgment of the court of appeals, and remand for reconsideration in light of the recent decision of the Supreme Court of Louisiana in *Keith v. United States Fidelity & Guaranty Co.*, 694 So.2d 180 (La. 1997).

2. Whether under the Rules of Decision Act, 28 U.S.C. §1652, the court of appeals was "*Erie*-bound" to follow the decision of the Supreme Court of Louisiana in *Keith v. United States Fidelity & Guaranty Co.*, 694 So.2d 180 (La. 1997).

3. Whether retroactivity of state statutes and judicial decisions is determined under the principles announced in this Court's decision in *Landgraf v. USI Film Products*, 511 U.S. 244, 114 S.Ct. 1483, 128 L.Ed.2d 229 (1994), or, instead, under state law.

## LIST OF PARTIES AND AFFILIATES

Pursuant to Supreme Court Rule 14.1(b), Petitioner lists the parties to the proceeding in the court below as follows:

Plaintiff-Appellant (Respondent):

John L. Davis

Intervenor-Appellant (Respondent):

Fidelity & Casualty Company of New York

Defendant-Appellee (Petitioner):

J.E. Merit Constructors, Inc.

Further, pursuant to Supreme Court Rule 14.1(b), Petitioner lists the parent company of J.E. Merit Constructors, Inc. as:

Jacobs Engineering Group, Inc.

J.E. Merit Constructors, Inc. does not have non-wholly owned subsidiaries.

Petitioner has been unable to obtain a response from Intervenor-Appellant regarding any parents or subsidiaries of Fidelity & Casualty Company of New York.

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## OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit is unreported. App. 1a. The district court entered judgment in petitioner's favor on June 11, 1996. App. 14a & 23a.

## STATUTORY PROVISIONS

> The law of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.
>
> 28 U.S.C. sec. 1652
>
> 1996 La. Acts, No. 3, First Extraordinary Session (set out in appendix – 25a)

## STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254. Petitioner seeks review of a judgment of the United States Court of Appeals for the Fifth Circuit entered on June 11, 1997, from which rehearing was denied on July 15, 1997.

## STATEMENT OF THE CASE

John L. Davis brought this diversity suit against petitioner, J.E. Merit Constructors, Inc., ("Merit") and Dow

Chemical Company ("Dow"),[1] to recover damages for injuries aliegedly suffered when he inhaled chemical fumes while working at a Dow-owned plant.

Just prior to Mr. Davis' accident, Dowell-Schlumberger, one of many contractors working in the plant, cleaned a heat exchanger with diluted hydrochloric acid. Dowell-Schlumberger then neutralized and removed the remaining acid, and certified to Dow that the system was acid free. Thereafter, Dow authorized maintenance workers to remove the blinds[2] from pipes leading to the heat exchanger. As one of the blinds was removed, a liquid trapped behind it dripped to the ground and, according to Mr. Davis, vaporized. Mr. Davis immediately left the area without coming into contact with the fumes. A half hour later, after Dow declared the area safe, Mr. Davis returned to retrieve his truck and allegedly inhaled fumes lingering in the cab of the truck.

When the suit was tried, in November, 1995,[3] Louisiana law prohibited the jury from considering the fault of parties not before the court. *Cavalier v. Cain's Hydrostatic Testing, Inc.*, 657 So.2d 975 (La. 1995). Therefore Merit could not argue that Dow, Dowell-Schlumberger or

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[1] The trial court dismissed Dow on a motion for summary judgment, holding that Dow as Mr. Davis' ad hoc employer and therefore immune from suit.

[2] A blind is a device used to block the flow of liquids or gasses in pipes. In this case, blinds were used to isolate the heat exchanger from production equipment during cleaning.

[3] The case was initially tried in 1994. The trial court granted Merit's motion for judgment as a matter of law at the close of plaintiff's case-in-chief. This decision was reversed on appeal and the case was remanded for a new trial.

others were at fault. After a verdict was returned for plaintiff, Merit filed post-trial motions, requesting dismissal of the plaintiff's suit and, alternatively, a new trial. These motions were filed on December 8, 1995, and taken under advisement.

While post-trial motions were pending, the Louisiana Legislature passed Act 3 of 1996, which was signed by the Governor on April 16, 1996. Act 3 amended Louisiana Civil Code article 2323 to require that the fault of all persons contributing to an injury must be determined, regardless of whether they are before the court, or like Dow, immune from suit. Act 3 contained no provision regarding its retroactive or prospective application.

On June 7, 1996, the district Judge – citing Davis' failure to prove Merit's workers were responsible for the leak – entered judgment as a matter of law, dismissing Mr. Davis' suit and, in the alternative, granting Merit's request for a new trial.[4] Mr. Davis appealed.

Merit filed its appellee's brief on January 23, 1997. At that time, two Louisiana appellate decisions held that Act 3 could *not* be applied retroactively to pending cases: *Moore v. Safeway, Inc.*, No. 95-1552, 1996 WL 684184, ___ So.2d ___ (La. App. 1st Cir. 1996); *Thornhill v. Louisiana Dept. of Transportation and Development*, 676 So.2d 799 (La. App. 1st Cir. 1996). Therefore, *Cavalier*, which prohibited consideration of third-party fault, still controlled when this appeal was briefed and continued to control when this appeal was argued.

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[4] The trial court granted a new trial only in the event that its decision to overturn the jury verdict was reversed on appeal.

On May 9, 1997, eight days after the appeal in this case was argued, the Louisiana Supreme Court issued its decision in *Keith v. United States Fidelity & Guaranty Co.*, 682 So.2d 745 (1996), holding that Act 3 was interpretative and therefore applicable to all pending cases.[5] On June 11, 1997, the Fifth Circuit issued its opinion in this case, overruling the trial judge's judgment as a matter of law, and further overruling the alternative judgment granting Merit a new trial.

Merit timely filed a petition for rehearing arguing that it should be granted a new trial in light of *Keith*, Merit's petition for rehearing and a subsequent motion for recall and stay of mandate pending application for certiorari were denied without reasons.

## REASONS FOR GRANTING PETITION

This application presents the following issue: When during the pendency of an appeal, state law changes so as to provide a defendant with additional, previously unavailable defenses, is a federal appellate court, sitting in diversity, bound by precedent to consider the new law and, if appropriate, grant a new trial?

Where a recent decision of the state's highest court affects a diversity case pending on appeal in a federal court, this Court's "longstanding practice" has been to

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[5] The one word writ grant issued in *Keith* on November 15, 1996 gave no hint as to the issue presented for review, and the lower court's decision was not published. *Keith*, 694 So.2d at 181 nn. 1 & 2.

grant a petition for certiorari, vacate the judgment which has ignored the new law, and remand for reconsideration (a "GVR order"). *E.g., Lords Landing Village Condominium Council v. Continental Insurance Company,* ___U.S. ___, 117 S.Ct. 1731, 1732, 138 L.Ed.2d 91 (1997); *Lawrence v. Chater,* ___ U.S. ___, 116 S.Ct. 604, 606, 133 L.Ed.2d 545 (1996).

The issues and chronology of the instant case are remarkably similar to those in *Lords, supra,* and *Thomas v. American Home Products, Inc.,* ___ U.S. ___, 117 S.Ct. 282, 136 L.Ed.2d 201 (1996). In *Lords,* the new state-court decision, which antedated the federal appellate decision by 11 days, was raised for the first time in appellant's motion to recall the appellate mandate. In *Thomas,* the new state-court decision was brought to the federal appellate court's attention on a petition for rehearing. Both in *Lords* and in *Thomas,* this Court granted GVR orders directing the appellate court to consider the effect of the new state law.[6]

The present case is also remarkably similar to this Court's seminal decision in *Huddleston v. Dwyer,* 322 U.S. 232, 64 S.Ct. 1015, 88 L.Ed. 1246 (1944). There, the intervening decision of the state supreme court was raised on a second petition for rehearing but the federal court of appeal denied this request for discretionary review. This

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[6] In his concurring opinion in *Thomas,* Justice Scalia, while acknowledging that he had "been critical of the Court's excessive use of the GVR mechanism" in the past, nevertheless concluded that the question presented "falls squarely within our historical use of the GVR mechanism." *Thomas,* 117 S.Ct. at 282 (Scalia, J., concurring).

Court vacated and remanded, with the following observation:

> It is the duty of the federal appellate courts, as well as the trial court, to ascertain and apply the state law where, as in this case, it controls decision. And a judgment of a federal court ruled by state law and correctly applying that law as authoritatively declared by the state courts when the judgment was rendered, must be reversed on appellate review if in the meantime the state courts have disapproved of their former rulings and adopted different ones. 'Until such time as the case is no longer sub judice, the duty rests upon federal courts to apply state law under the Rules of Decision statute in accordance with the then controlling decision of the highest state court.'

*Huddleston*, 322 U.S. at 236, 64 S.Ct. at 1018 (citations omitted).

In his opposition to Merit's motion to recall and stay the mandate, Mr. Davis argued: (1) that Merit had forfeited the issue of retroactivity of the 1996 amendatory act by not urging it earlier; (2) that it was dilatory in bringing the change in the law to the appellate court's attention; and (3) that the *Keith* decision is procedural, therefore not binding on federal courts.

Concerning the forfeiture argument, we borrow the words of the Eighth Circuit Court of Appeal in *United States v. Wood*, 834 F.2d 1382, 1389 n.4 (8th Cir. 1987), which recognized as "well established" that an *appellee* may raise any statutory ground *in support of* the district court's judgment even when that ground was not raised by the appellee in the district court. *See Schweiker v.*

*Hogan*, 457 U.S. 569, 585 n.24, 102 S.Ct. 2597, 2607 n.24, 73 L.Ed.2d 227 (1982); *Helvering v. Gowran*, 302 U.S. 238, 245-46, 58 S.Ct. 154, 157-58, 82 L.Ed. 224 (1937) (Brandeis, J., for a unanimous court); *see also* 16A C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure: Jurisdiction* § 3974.2, at 493 (1996).

As for being dilatory in bringing the *Keith* decision to the appeal court's attention, both the facts and precedent show that Merit acted timely. In *Lords*, counsel did not learn of the intervening state court decision and bring the decision to the federal court's attention until 56 days after it was handed down by the state court – some 45 days after the federal court had ruled. In the present case, Merit brought *Keith*[7] to the Fifth Circuit's attention just 47 days after *Keith* was handed down and only 14 days after the Fifth Circuit's decision. Thus, Merit's counsel acted with even greater dispatch in learning of *Keith* and advising the court than was exhibited by counsel in *Lords*.

Opposing counsel's contention that the *Keith* decision is procedural, and therefore not binding upon federal courts sitting in diversity, may best be answered with a question: What results would counsel envision in the many similar cases presently pending in Louisiana's state and federal courts? Will state-court defendants be permitted to have juries assess fault to non-parties while federal court defendants will be prohibited from doing so? On what state law will the federal courts rely: pre-amendment language in Louisiana Civil Code article 2323, the

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[7] *Keith* was issued only 33 days prior to the Fifth Circuit's decision in this case.

now overruled decision in *Cavalier*, some prior "non-procedural" expression of the state courts, or will federal courts simply create law more to their taste? In this connection, reference to this Court's decision in *Hanna v. Plumer*, 308 U.S. 460, 85 S.Ct. 1136, 14 L.Ed.2d 8 (1965), is useful. *Hanna* instructs that, where the rule of decision is not provided by the Federal Rules of Civil Procedure, the *Erie* analysis is to be conducted with reference to the "twin aims" of *Erie*: discouragement of forum-shopping and the avoidance of inequitable administration of laws. 380 U.S. at 468, 85 S.Ct. at 1142. It is, perhaps, for this reason that the Fifth Circuit Court of Appeal considers itself bound to follow the Louisiana Supreme Court's changing pronouncements concerning the proper application of comparative fault principles. *Reed v. Shell Offshore, Inc.*, 872 F.2d 680, 683 (5th Cir. 1989).

Counsel for Mr. Davis has also suggested that under *Landgraf v. USI Film Products*, 511 U.S. 244, 114 S.Ct. 1483, 128 L.Ed.2d 229 (1994), *federal* statutory construction rules determine whether *Keith* will be given retroactive effect. Unlike *Landgraf*, this case does not involve a federal interpretation of a congressional enactment. It involves a state legislative act which the state's highest court held to be retroactive. Under Louisiana law, "[w]here the law has changed during the pendency of a suit and retroactive application of the new law is permissible, the new law applies on appeal even though it requires reversal of a trial court judgment which was correct under the law in effect at the time it was rendered." *Segura v. Frank*, 630 So.2d 714, 725 (La. 1994), *cert. denied sub nom., Allstate Ins. Co. v. Louisiana Insurance Guaranty Assoc.*, 511 U.S. 1142, 114 S.Ct. 2165, 128 L.Ed.2d 887 (1994). All of which brings us back to *Huddleston* and the clearly applicable pronouncement that:

> A judgment of a federal court ruled by state law and correctly applying that law as authoritatively declared by the state courts when the judgment was rendered, must be reversed on appellate review if in the meantime the state courts have disapproved of their former rulings and adopted different ones.

*Huddleston*, 322 U.S. at 236, 64 S.Ct. at 1018.

At trial, the *Cavalier* decision effectively silenced Merit's counsel by prohibiting any argument that third parties, not before the court, were at fault. Following trial, the Louisiana Supreme Court overruled *Cavalier* and declared the new law applicable to pending cases. Application of *Huddleston* and *Keith* to the present case will result in Merit being granted a new trial, one in which it could limit, and possibly eliminate, its liability to Mr. Davis by bringing in evidence of fault on the part of such parties as the Dow Chemical Company – whose employees issued the safe-work permits to contract workers, directing them to do the work which caused the alleged chemical spill, and whose employees declared the area safe for Mr. Davis to return; National Maintenance Corporation – whose employees may have been involved in the work which resulted in the spill; and Dowell-Schlumberger – whose employees allowed the acid which allegedly injured Mr. Davis to remain in piping after they certified that the acid had been neutralized and removed.

Petitioner requests that under its "longstanding practice," this Court grant, vacate and remand, with instructions to the Fifth Circuit Court of Appeal that it reconsider the propriety of the district court's grant of a

new trial in light of the intervening change in the law brought about by the Louisiana Supreme Court decision in *Keith*.

Respectfully submitted,

By Attorney,

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# APPENDIX

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**UNITED STATES COURT OF APPEALS**
**FOR THE FIFTH CIRCUIT**

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No. 96-30671

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JOHN L. DAVIS,

Plaintiff-Appellant,

FIDELITY & CASUALTY COMPANY OF NY,

Intervenor/Plaintiff-Appellant,

versus

DOW CHEMICAL, ET AL.,

Defendants,

J.E. MERIT, a Division of Jacobs Engineering Group, Inc.,

Defendant-Appellee.

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Appeals from the United States District Court
For the Middle District of Louisiana
(91-CV-859)

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(Filed Jun. 11, 1997)

Before POLITZ, Chief Judge, KING, Circuit Judge, and FOLSOM,* District Judge.

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* District Judge of the Eastern District of Texas, sitting by designation.

POLITZ, Chief Judge:**

John Davis appeals an adverse judgment as a matter of law following a favorable jury verdict. Concluding that the district court erred in granting the judgment as a matter of law and in alternatively granting a motion for new trial, we reverse and render judgment on the jury verdict.

## Background

Davis claims that he suffered injuries in September 1990 as a result of inhaling fumes from a chemical spill in the L.G.T.I. Unit at the Dow Chemical plant in Plaquemine, Louisiana. Dow had shut down the unit and hired several contract crews to perform repairs, cleaning, and routine maintenance.

The unit contained a cooling system for quench water, referred to as the Fin-Fan, located 30 feet above ground in one of two pipe racks separated by an alleyway for the movement of people and vehicles. Several days before the incident in question employees of Dowell-Schlumberger, a contract company, had cleaned the Fin-Fan by pumping 1500 gallons of a 20% hydrochloric acid solution through its pipes. "Blinds" were installed in pipes and valves for the purpose of cordoning off the equipment and pipes being cleaned. The Fin-Fan was

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** Pursuant to Local Rule 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in Local Rule 47.5.4.

then rinsed with water and a soda ash solution and drained.

Davis worked at the Dow plant as lead carpenter for a contract scaffolding crew. He was employed by Cherokee Construction Company. On September 15, 1990 at approximately 11:30 p.m. while he and his crew were putting up scaffolding in the LGTI Unit, Davis, who was in the scaffolding approximately 20 to 25 feet above the ground on the opposite side of the alleyway from the Fin-Fan, noticed a large, thick white cloud of vapors rising from the alleyway about five to ten feet from the Cherokee truck. He also saw a clear liquid pouring from the pipe rack across the alleyway, splattering through the scaffolding, and falling to the alleyway. The scaffolding crew smelled a strong odor and quickly evacuated the area. When Davis reached the end of the alleyway, about 45 seconds after first noticing the fumes, he looked up into the pipe rack and saw two men wearing blue hard-hats putting bolts into a pipe or valve located directly above the scaffolding through which the clear liquid was pouring. The men were removing a blind that had been installed before commencement of the acid wash.

About that time James White arrived. White worked for J.E. Merit, a contractor on site, but he was also the night shift coordinator and liaison between Dow and the several contract companies performing services as part of the maintenance work being done on the LGTI Unit. When White spotted the leak he yelled at the men wearing the blue hard-hats, instructing them to immediately put the bolts back in the valve.

White discussed the incident at the next safety meeting,[1] telling the contract workers to be careful about causing a spill and that they should take care to prevent any liquid from falling to the ground. White warned the workers that causing a leak could result in being fired. At the meeting, the two workers wearing the blue hard-hats Davis saw in the scaffolding sat at a table reserved for J.E. Merit employees, and White, a Merit supervisor, directed some of his comments to the two employees who wore the blue hard-hats. White obviously knew them, addressing one by a nickname.

After the spill, Davis and his men had a brief dinner and then returned to the site which Dow personnel had washed down. White directed that the Cherokee truck be moved from the alleyway. When Davis opened the driver side door he encountered fumes like those he had experienced during the spill. The fumes apparently had entered the truck through a broken passenger window. Davis was overcome by the fumes and momentarily lost his breath. After allowing time for the truck to air out, Davis removed it from the alleyway.

By the end of his shift Davis felt as if he was coming down with a bad cold. His condition worsened, and on September 19, 1990 he sought medical attention. After he told the emergency room doctor about the September 15 incident, the emergency room doctor diagnosed tracheal bronchitis and prescribed various medicines. The company

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[1] Evidence varied on whether this meeting occurred immediately following the spill or the day after.

doctor also gave Davis medication to alleviate his cold and flu-like symptoms.

When his symptoms did not improve, Davis went to see Dr. Thomas Nuttli, a pulmonologist. After running several tests, Dr. Nuttli diagnosed Davis as having Reactive Airways Dysfunction Syndrome as a result of acid vapor inhalation.[2] Dr. Nuttli treated Davis for nearly two years; his replacement continued to treat Davis at the time of trial.

Davis sought damages for these injuries. His first jury trial occurred in January 1994. At the close of Davis's case-in-chief, the district court granted J.E. Merit's motion for judgment as a matter of law. Davis appealed, we reversed the judgment as a matter of law, vacated the district court's denial of Davis's motion for a new trial, and remanded the case for further proceedings.

The second jury trial was had in November 1995. At the close of Davis's case-in-chief, J.E. Merit again moved for judgment as a matter of law. The district court denied the motion and the case was submitted to the jury. The

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[2] Dr. Dalton, an allergist who had performed tests on Davis, testified that Davis did not have any allergies that would cause the head, throat, and chest symptoms he continued to experience. Dr. Dalton testified that Davis was suffering from a reactive airways disorder contemporaneous with and causally related to his chemical exposure at Dow. Additionally, in May 1991 Davis's worker's compensation carrier, Fidelity & Casualty Company of New York, sent Davis to another pulmonary disease specialist who testified that he agreed with Dr. Nuttli's diagnosis and that Davis's condition was caused by exposure to chemical fumes on September 15.

jury answered four special interrogatories in the affirmative, finding that employees of J.E. Merit or a person acting under Merit's control removed a "blind" from a pipe at Dow's LGTI Unit, that the act was negligent or done in a negligent manner, that the act caused the leakage of a harmful substance, and that the harmful substance injured the plaintiff. The jury returned a verdict for Davis – $9,000 for past medical expenses, $50,000 for future medical expenses, $68,000 for past lost wages, $200,000 for loss of future earning capacity, and $125,000 in general damages.

Merit renewed its motion for judgment as a matter of law and, in the alternative, a motion for new trial. The district court granted both of Merit's motions and entered judgment in accordance with those rulings.[3] Davis timely appealed.

## Analysis

### A. Judgment as a Matter of Law

We review a judgment as a matter of law *de novo*, applying the same standard used by the district court.[4] The evidence, along with all reasonable inferences which can be drown therefrom, is considered in the light most favorable to the jury verdict.[5] A judgment as a matter of law should not be granted unless the facts and inferences

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[3] The court conditionally granted a new trial depending on whether we reversed the judgment as a matter of law.

[4] **Ikerd v. Blair,** 101 F.3d 430 (5th Cir. 1996).

[5] **Crosthwait Equip. Co. v. John Deere Co.,** 992 F.2d 525 (5th Cir. 1993).

point so strongly and overwhelmingly against the verdict that reasonable persons could not disagree.[6]

Our task is to determine whether there was evidence before the jury supportive of each element of Davis's claim. This is a simple negligence case. Substantial evidence supports the finding that Davis was injured by fumes he inhaled on the evening in question while working at the Dow facility. Eyewitnesses testified that a cloud of noxious vapors arose from the area of the chemical spill. Davis's testimony and that of several doctors adequately substantiated his claim that his subsequent physical difficulties resulted from the inhalation of noxious fumes from that spill. The jury permissibly could have inferred negligence. White testified that on previous occasions chemicals had leaked behind the blinds. It was therefore foreseeable that this scenario might occur and the jury was free to conclude, as it obviously did, that the failure to anticipate and prevent a spill of this nature was, under all relevant circumstances, unreasonable and therefore negligent.

The only arguable basis for upholding the judgment as a matter of law is that the identity of the employees responsible for the spill was not proven adequately. The district court rested its judgment on this point. Our review of the record persuades that sufficient evidence supported the jury's determination that the responsible workers were employees of J.E. Merit, or persons for whom J.E. Merit was legally responsible.

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[6] **Omnitech Int'l, Inc. v. Clorox Co.,** 11 F.3d 1316 (5th Cir. 1994)

Davis testified that only J.E. Merit employees wore blue hard-hats. White arrived on the scene and ordered the two men in the pipe rack to stop the leak. During the safety meeting the employees in question sat at a table reserved for J.E. Merit employees and White addressed admonitions to them personally, calling one of them by a nickname. It cannot be again said that reasonable minds could differ as to the identity of the critical employees. The judgment as a matter of law was granted in error and must be reversed.

B. Motion for New Trial

The trial court may set aside a jury verdict which is against the great weight and preponderance of the evidence.[7]

> When the trial judge sets aside a jury verdict and orders a new trial, however, our deference to him is in opposition to the deference due the jury. Consequently, in this circuit as in several others, we apply a broader review to orders granting new trials than to orders denying them. And where a new trial is granted on the ground that the verdict is against the weight of the evidence, we exercise particularly close scrutiny, to protect the litigants' right to a jury trial.[8]

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[7] **Williams v. Chevron U.S.A., Inc.**, 875 F.2d 501 (5th Cir. 1989).

[8] **Shows v. Jamison Bedding, Inc.**, 671 F.2d 927, 930 (5th Cir. 1982) (citations omitted).

To prevent an inappropriate substitution of the trial court's judgment for that of the jury, new trials granted on evidentiary grounds will not be upheld "unless, at a minimum, the verdict is against the great – not merely the greater – weight of the evidence."[9]

In prior cases, we have noted three factors that militate against new trials and require a particularly searching review of the evidence: (1) simplicity of the issues, (2) the extent to which the evidence is in dispute, and (3) the absence of any pernicious or undesirable occurrence at trial.[10] If these factors are present,

> our deference to the jury is reinforced by our confidence in its ability to understand the issues, to evaluate credibility and sort through conflicting testimony, and to act reasonably and fairly in the absence of prejudicial influences. In this situation there is little, if any, need to defer to the judge as against the jury, and we will not affirm an order granting a new trial unless on review we are satisfied, independently, that the jury verdict was against the great weight of the evidence.[11]

All of the foregoing principles apply to this case; we cannot agree that the verdict was against the great weight of the evidence.

The evidence varied about whose employees were in the pipe rack. The plaintiff asserted that they were J.E.

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[9] **Conway v. Chemical Leaman Tank Lines, Inc.**, 610 F.2d 360, 363 (5th Cir. 1980).

[10] *See, e.g.*, **Shows; Conway.**

[11] **Shows** at 931.

Merit employees primarily because (1) they wore blue hats, which he understood were unique to J.E. Merit employees; (2) they were seated at a table reserved for J.E. Merit employees during the safety meeting; (3) White, the J.E. Merit supervisor, admonished the workmen and called one of them by a nickname during that meeting; and (4) the removal of blinds was a task that J.E. Merit employees would likely perform. Evidence supports all of these assertions.

There was controverting evidence. Two of the plaintiff's witnesses were unsure of the color of the hard-hats. Defense witnesses testified that Dow employees wore blue hard-hats and that supervisors from several of the contractors on site wore blue hard-hats. Defense testimony also indicated that National Maintenance Co., another contractor on site, could have been responsible for removing the subject blinds. White testified, however, that he personally supervised and directed mixed crews of J.E. Merit and National Maintenance employees.

Taking the evidence as a whole, we conclude that a reasonable juror was free to conclude that either or both of the two men in the pipe rack were employees of J.E. Merit.

We are mindful that the defendant's evidence cast doubt on the identity of the employees in the pipe rack, but there manifestly is no "great weight" of evidence in this record to that effect. All issues were hotly contested and supported by substantial evidence on both sides. This was a jury call and its decision must be reinstated. We therefore reverse the judgment as a matter of law and the alternative grant of new trial, and render judgment in

favor of the plaintiff reinstating the jury verdict. An appropriate judgment thereon is to be entered by the district court.

REVERSED and RENDERED.

**UNITED STATES COURT OF APPEALS**
**FOR THE FIFTH CIRCUIT**

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No. 96-30671

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D.C. Docket No. 91-CV-859

JOHN L. DAVIS

Plaintiff - Appellant

FIDELITY & CASUALTY COMPANY OF NY

Intervenor-Plaintiff - Appellant

v.

DOW CHEMICAL, ET AL

Defendants

J E MERITT, a Division of Jacobs Engineering Group, Inc

Defendant - Appellee

Appeals from the United States District Court for the Middle District of Louisiana, Baton Rouge.

Before POLITZ, Chief Judge, KING, Circuit Judge, and FOLSOM, District Judge.*

JUDGMENT

(Filed Jun. 11, 1997)

This cause came on to be heard on the record on appeal and was argued by counsel.

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*District Judge of the Eastern District of Texas, sitting by designation.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is reversed, and judgment is rendered in favor of the plaintiff reinstating the jury verdict.

IT IS FURTHER ORDERED that defendant-appellee pay to plaintiff-appellant/intervenor-plaintiff-appellant the costs on appeal to be taxed by the Clerk of this Court.

ISSUED AS MANDATE: JUL 23 1997

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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

JOHN L. DAVIS
VERSUS
DOW CHEMICAL, ET AL

CIVIL ACTION
NO. 91-859-A

## RULING ON MOTIONS

(Filed Jun. 7, 1996)

This matter is before the court on defendant's renewed motion for judgment as a matter of law or, in the alternative, for a new trial. Plaintiff has filed an opposition. Oral argument is not necessary. Jurisdiction is based on 28 U.S.C. § 1332.

Plaintiff filed suit against J. E. Merit Constructors, Inc. for damages allegedly resulting from defendant's negligence. At the conclusion of defendant's case in chief, defendant moved for judgment as a matter of law under Fed. Rule Civ. Pro. 50 and that motion was denied. The jury found for plaintiff and awarded him damages for past and future medical expenses, lost wages and loss of future earning capacity, and general damages. Defendant now renews its motion for judgment as a matter of law and moves for new trial under Fed. Rule Civ. Pro. 59 in the alternative.

## BACKGROUND

The defendant, J.E. Merit, was one of two contractors, referred to by Dow as "maintenance contractors" who contracted to supply the necessary labor and tools to

perform whatever maintenance work Dow specified at its chemical plant in Plaquemine, Louisiana. The other contractor was National Maintenance Corporation, not a party to this litigation. The "maintenance contracts" generally required the contractor to furnish pipefitters, welders, carpenters, general labor, etc. in the plant.

At the time of plaintiff's alleged injury, Dow was performing maintenance on a unit called the L.G.T.I. Unit which gasified coal into a synthetic fuel. Part of that unit was a fin-fan unit which was located well off the ground in a pipe rack.[1] The fin-fan unit was a cooling system for quench water. The unit was entirely shut down. Dow let a contract to Dowell-Schlumberger to clean the fin-fan unit with acid water, to neutralize the cleaning water and to flush it from the lines. Dow also contracted with plaintiff's employer, Cherokee Scaffolding, Inc., to supply scaffolding for the other workers.

Plaintiff's accident occurred in the middle of the night. Plaintiff testified that while he was on a scaffold, alongside the pipe rack, two men in blue hard hats, who he testified were employees of J. E. Merit, removed a "blind" from a pipe above the plaintiff, causing liquid to pour from the pipe some 30 feet down to the ground and onto a truck owned by Cherokee parked in the alleyway. Plaintiff testified that when this liquid hit the ground it produced a "thick white cloud" which had a strong "chemical" odor. According to plaintiff, he and his fellow workers immediately cleared the area, running down the

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[1] Actually there were two pipe racks separated by an alleyway through which workers and vehicles moved.

alleyway and away from the pipe rack. Sometime later, the Cherokee and other employees returned to the scene. Plaintiff testified, that upon his return, he was instructed to remove his employer's truck from the alleyway and wash it. He said that when he opened the door of the truck, he breathed in "chemical fumes" which had accumulated in the truck, causing him physical injury.

Plaintiff does not claim to have seen the men on the pipe rack remove the bolts, or to know the identity of the men. Plaintiff claims that he knew that the men he saw in the pipe rack after the liquid spilled had caused the leak. Plaintiff claims that he knew the men were Merit employees primarily because they wore blue hard hats. His testimony was that Merit employees and only Merit employees wore blue hard hats.

## DISCUSSION

**Judgment as a Matter of Law**

Fed. Rule Civ. Pro. 50(a)(1) says:

> If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue.

If the evidence presented at trial by a party with the burden of proof is not sufficient to create an issue of fact

for the jury, the other party is entitled to judgment as a matter of law. The proper question is whether there is enough evidence that the jury could properly return a verdict for the opposing party.[2] The court is not free to weigh the parties' evidence, pass on the credibility of witnesses, or substitute its judgment for that of the jury. The court should view the evidence in the light most favorable to the nonmoving party, and give that party the benefit of all reasonable inferences which can be drawn from the evidence.[3] Thus, the court must now determine whether there was evidence before the jury regarding each element of plaintiff's claim which would support the jury's verdict for the plaintiff.

From the beginning of this case, plaintiff has identified the two men upon the pipe rack whom he claims caused the spill which released the liquid that harmed him by their blue (Merit) hard hats. He testified at the first trial and again at this trial that Merit employees and only Merit employees wore blue hard hats. His testimony on this point was not corroborated by any other witness.

At trial, the parties placed much emphasis on sorting out the color scheme for the hard hats in the Dow plant. Anthony Juge [sic], a Dow supervisor, testified that only Dow employees and the supervisory employees of the contractors working in the plant wore blue hard hats. Juge [sic] testified that hourly employees of the contractors wore yellow hard hats. Jim White, a supervisory

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[2] **Anderson v. Liberty Lobby, Inc.**, 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

[3] **Lytle v. Household Mfg., Inc.**, 494 U.S. 545, 110 S.Ct. 1331, 108 L.Ed.2d 504 (1990).

employee of Merit, also testified that Dow employees and supervisors of the contractors wore blue hard hats, while hourly workers wore yellow hard hats.

In a diversity case such as this one, a federal court applies the law of the state in which it sits as to burden of proof. **Guaranty Trust Co. Of N.Y. v. York,** 326 U.S. 99, 65 S.Ct. 1464, 89 L.Ed.2d 2079 (1945). In Louisiana, negligence is never presumed and plaintiff bears the burden of proving his claims by a reasonable prepondance of the evidence. "Mere possibilities are insufficient to support a judgment." **Pool v. Missouri Pacific R. Co.,** 541 So.2d 969, 973 (La. App. 2 Cir. 1989). See also **Cay v. State DOTD,** 631 So.2d 393 (La. 1994); **Myles v. Turner,** 632 So.2d 384 (La. App. 2d Cir. 1994).

For purposes of this motion, the most crucial event in the trial was when plaintiff's counsel abandoned the plaintiff's version of who wore which color hats in his closing argument, and modified his argument to correlate with the testimony of the other witnesses. As discussed above, plaintiff testified that he was certain that the men who removed the bolts were Merit employees because they wore blue hard hats because only Merit employees wore blue hard hats. However, in view of the testimony of the other witnesses that all contract hourly workers, including Merit hourly workers, wore yellow hard hats, plaintiff's counsel argued to the jury, not that the men that caused the leak were simply Merit employees, but that they "must have been" Merit **supervisors.** Thus, counsel abandoned his client's testimony[4] and presented

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[4] So long as plaintiff's testimony as to hat color remained viable (only Merit employees wore blue hats), there was **some**

the jury with an argument which is unsupported by any evidence. Accepting the plaintiff's claim that the men whom he saw in the pipe rack immediately after the leak began were wearing blue hard hats and counsel's acceptance of the testimony of the other witnesses, the men plaintiff claims he saw in the pipe rack possibly were Dow employees, possibly were supervisory employees of Merit, possibly were supervisory employees of National Maintenance, possibly were supervisory employees of Dowell-Schlumberger, or possibly were supervisory employees of some other contractor. Thus, while the men could have been Merit supervisors, they also could have been supervisors for any of the other contractors, or even Dow employees. To recover, plaintiff must show probability, not a possibility. There is no evidence in the record to show that these men were more probably Merit supervisors than some other supervisors or even Dow workers. Plaintiff's counsel's argument that the wrongdoers "must have been" Merit supervisors is simply an unsupported suggestion by counsel. The court finds that there was no legally sufficient evidentiary basis for a reasonable jury to find for plaintiff on the issue of liability.

**New Trial**

Fed. Rule Civ. Pro. 50(c) requires the court to rule on defendant's motion for new trial should the judgment as a matter of law under Rule 50(A) be set aside.

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evidence that the men were Merit employees. Abandonment of this testimony by counsel removed the only evidentiary basis for identification of the men on the pipe rack as Merit employees.

Federal Rule of Civil Procedure 59(a) provides that:

> A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States. . . .

One of the grounds for a new trial is that the verdict is against the weight of the evidence.[5] The authority of a federal district court to grant a new trial for this reason is well established.[6] Unlike a motion for judgment as a matter of law, the court may set aside a jury verdict where there is evidence to support that verdict. The court may evaluate all significant evidence and rely on its best judgment to determine if the jury has so disregarded the clear weight of the evidence that a new trial is necessary to prevent injustice. That is to say that to grant a new trial on these grounds, the verdict must be against the great weight of the evidence.[7]

In support of this motion defendant urges the same arguments as it made in support of the motion for judgment as a matter of law. Defendant argues that plaintiff's

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[5] **Montgomery Ward and Co. v. Duncan,** 311 U.S. 243, 251, 61 S.Ct. 189, 194, 85 L.Ed. 147 (1940), as cited in **Herrmann v. Nicor Marine, Inc.,** 664 F.Supp. 241, 244 (E.D.La. 1985) and Wright & Miller, Federal Practice and Procedure: Civil § 2805.

[6] **Byrd v. Blue Ridge Rural Electric Cooperative, Inc.,** 356 U.S. 525, 540, 78 S.Ct. 893, 902, 2 L.Ed.2d 953 (1958).

[7] **Conway v. Chemical Leaman Tank Lines, Inc.,** 610 F.2d 360, 362-63 (5th Cir. 1980), aff'd in part, and remanded, 687 F.2d 108 (5th Cir. 1982), as cited in **Herrmann,** 664 F.Supp. at 244.

evidence regarding the person or persons who negligently removed the blind from the pipe is "sheer speculation and conjecture." Again, the court agrees. As discussed above, plaintiff did not support his theory of liability with evidence which would show that it is more probable than not that one of defendant's employees caused plaintiff's injuries. The court finds that the jury's verdict regarding defendant's liability was against the great weight of the evidence.

Among the matters which the court considers on this issue are the following:

Plaintiff was the only witness who claimed that the men on the pipe rack wore blue hard hats; the two co-employees who claimed to have seen the men saw colors other than blue.

The incident occurred in the middle of the night in an open area with some (no evidence of how much) artificial lighting. Artificial lighting can make colors difficult to distinguish.

The work which the men were performing (removal of bolts from a pipe flange thirty or forty feet above the ground) was clearly the sort of work performed by hourly workers, not supervisory employees. Thus, it would be unusual (and highly unlikely) that anyone's supervisory employees were up on the pipe rack.

If counsel for plaintiff has abandoned part of his client's testimony as unreliable, then other parts of his testimony may well be unreliable.

These factors, in conjunction with plaintiff's attorney's abandonment of plaintiff's theory of liability in his

closing arguments lead the court to find that the jury's verdict was against the great weight of the evidence.

In view of the court's resolution of the hat color issues, the other issues raised by defendant in its motion are not reached.

## CONCLUSION

The court finds that the defendant is entitled to judgment as a matter of law. The court also finds that the jury's verdict regarding defendant's liability was against the great weight of the evidence and that if the judgment as a matter of law is set aside that defendant is entitled to a new trial on these issues. For these reasons, defendants motion for judgment as a matter of law and alternatively, for new trial is hereby GRANTED.

Baton Rouge, Louisiana, June 7, 1996.

/s/ John V. Parker
JOHN V. PARKER,
CHIEF JUDGE
MIDDLE DISTRICT
OF LOUISIANA

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

JOHN L. DAVIS
VERSUS
DOW CHEMICAL, ET AL

CIVIL ACTION
NO. 91-859-A

**JUDGMENT**

(Filed June 10, 1996)

(Dkt & Entered June 11, 1996)

This cause came on before the court for trial, jury, the Honorable John V. Parker, Chief Judge, presiding, and the court having granted the Motion for Judgment as a Matter of Law and alternatively the Motion for New Trial on behalf of defendant, J.E. Merit Constructors, Inc.,

IT IS ORDERED ADJUDGED AND DECREED that judgment be entered herein in favor of defendant, J.E. Merit Constructors, Inc., and against plaintiff, John L. Davis, dismissing plaintiff's suit at plaintiff's costs and that if the Judgment as a Matter of Law entered herein be set aside on appeal that New Trial be held.

Baton Rouge, Louisiana, June 10, 1996.

/s/ John V. Parker
JOHN V. PARKER,
CHIEF JUDGE
MIDDLE DISTRICT
OF LOUISIANA

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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No. 96-30671

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JOHN L. DAVIS

Plaintiff-Appellant

FIDELITY & CASUALTY COMPANY OF NY

Intervenor-Plaintiff-Appellant

v.

DOW CHEMICAL, ET AL

Defendants

J E MERIT, a Division of Jacobs Engineering Group, Inc.

Defendant-Appellee

---

Appeals from the United States District Court for the Middle District of Louisiana, Baton Rouge

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**ON PETITIONS FOR REHEARING**

(Filed Jul. 15, 1997)

Before POLITZ, Chief Judge, KING, Circuit Judge, and FOLSOM*, District Judge.

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* District Judge of the Eastern District of Texas, sitting by designation.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above case is denied.

ENTERED FOR THE COURT:

/s/ Henry A. Politz
United States Circuit Judge

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ACT NO. 3

H.B. No. 21

**AN ACT to amend and reenact Civil Code Articles 2323 and 2324(B) and (C), relative to offenses and quasi offenses; to provide relative to civil liability for damages; to provide for the determination and allocation of fault; to provide for comparative fault and the application and effect thereof; to provide for solidary liability; to provide for joint and divisible liability; to provide with respect to the effect of interruption of prescription against a joint obligor; to provide for exceptions for certain joint tortfeasors; and to provide for related matters.**

*Be it enacted by the Legislature of Louisiana:*

Section 1. Civil Code Articles 2323 and 2324(B) and (C) are hereby amended and reenacted to read as follows:

**Art. 2323. Comparative fault**

A. In any action for damages where a person suffers injury, death, or loss, the degree or percentage of fault of all persons causing or contributing to the injury, death, or loss shall be determined, regardless of whether the person is a party to the action or a nonparty, and regardless of the person's insolvency, ability to pay, immunity by statute, included but not limited to the provisions of R.S. 23:1032, or that the other person's identity is not known or reasonably ascertainable. If a person suffers injury, death, or loss as the result partly of his own negligence and partly as a result of the fault of an other person or persons, the amount of damages recoverable shall be reduced in proportion to the degree or percentage of negligence attributable to the person suffering the injury, death, or loss.

B. The provisions of Paragraph A shall apply to any claim for recovery of damages for injury, death, or loss asserted under any law or legal doctrine or theory of liability, regardless of the basis of liability.

C. Notwithstanding the provisions of Paragraphs A and B, if a person suffers injury, death, or loss as a result partly of his own negligence and partly as a result of the fault of an intentional tortfeasor, his claim for recovery of damages shall not be reduced.

**Art. 2324. Liability as solidary or joint and divisible obligation**

* * *

B. If liability is not solidary pursuant to Paragraph A, then liability for damages caused by two or more persons shall be a joint and divisible obligation. A joint tortfeasor shall not be liable for more than his degree of fault and shall not be solidarily liable with any other person for damages attributable to the fault of such other person, including the person suffering injury, death, or loss, regardless of such other person's insolvency, ability to pay, degree of fault, immunity by statute or otherwise, including but not limited to immunity as provided in R.S. 23:1032, or that the other person's identity is not known or reasonably ascertainable.

C. Interruption of prescription against one joint tortfeasor is effective against all joint tortfeasors.

Section 2. This Act shall become effective upon signature by the governor or, if not signed by the governor, upon expiration of the time for bills to become law without signature by the governor, as provided in Article III, Section 18 of the Constitution of Louisiana. If vetoed by the governor and subsequently approved by the legislature, this Act shall become effective on the day following such approval.

Approved April 16, 1996.

PETITION FOR REHEARING

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IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

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No. 96-30671

---

JOHN L. DAVIS,
Plaintiff-Appellant

FIDELITY & CASUALTY COMPANY OF NY,
Intervenor/Plaintiff-Appellant

VERSUS

DOW CHEMICAL, ET AL,
Defendants

J. E. MERIT CONSTRUCTORS, INC.,
a Division of Jacobs Engineering Group, Inc.,
Defendant-Appellee

---

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE MIDDLE DISTRICT OF LOUISIANA
DOCKET NO. CA-91-859-A-1
THE HONORABLE JOHN V. PARKER, PRESIDING

BORIS F. NAVRATIL
La. Bar Rol. No.: 9909
ANDRÉ G. BOURGEOIS
La. Bar. Roll No.: 19298
NAVRATIL, HARDY & BOURGEOIS
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Counsel for
Defendant-Appellee,
J. E. Merit Constructors, Inc.

**MAY IT PLEASE THE COURT:**

Defendant-appellee, J. E. Merit Constructors, Inc., respectfully requests a rehearing on this Court's reversal of the judgment as a matter of law and conditional grant of a new trial rendered in the District Court.

A rehearing is warranted because (1) this Court's finding of liability is premised upon a misinterpretation of the record; and (2) a significant change in the law occurred subsequent to the argument of this appeal. Under the circumstances presented, a rehearing should be granted and the JMOL affirmed, or, in the alternative, the case should be remanded to the district court for further consideration.

**1. This Court misinterpreted the record.**

In overturning the district court's judgment as a matter of law, this Court found that the jury "inferred"

Merit's negligence based on James White's knowledge of prior chemical leaks in the fin fan unit. Specifically, the panel opinion states:

> White testified that on previous occasions chemicals had leaked behind the blinds. It was therefore foreseeable that this scenario might occur and the jury was free to conclude, as it obviously did, that the failure to anticipate and prevent a spill of this nature was, under all relevant circumstances unreasonable and therefore negligent.

*Panel Opinion*, at 7.

The Court's logic is unassailable. *If* White had prior knowledge of **chemicals** leaking from behind the blinds following the clean-out process, the possibility that chemicals would again leak could constitute a foreseeable hazard. Under this hypothetical, a reasonable jury could conclude that Merit, White's employer, was negligent for failing to anticipate and prevent the spill. However, the factual predicate for the Court's conclusion – that Mr. White knew of previous "chemical leaks" and was therefore negligent – is not supported by *any* evidence contained in the record.

Mr. White's testimony reveals that while he was aware of infrequent occurrences where **water** remained in lines following cleaning, he was not aware of **chemicals** *ever remaining in lines or leaking behind the blinds* following this procedure.

> Q Do you know whether or not when an acid wash, such as that, that had been conducted by Dowell-Schlumberger, whether there is

ordinarily smoke [sic] liquid from that process left in the lines?

A No ordinarily. There might be some trapped on top of a valve sometimes, but it's not ordinary, no sir.

Q This is something that you are familiar with, from your experience as a superintendent?

A Sir?

Q *This* phenomenon, *where water can get trapped up in a line, following* acid wash, this is something you have observed from your own knowledge and your own experience in past shutdowns?

A I've seen it from time to time, but not very often.

*November 20, 1995 Trial Transcript*, Vol. I of II, at 151-52 (on *cross-examination by plaintiff's counsel*, with emphasis added).

Not only does the record fail to document even a single prior occurrence where chemicals were found in the unit following cleaning operations, the procedures utilized by Dowell-Schlumberger and Dow Chemical unquestionably created an expectation that *no* chemicals remained following clean out.

After cleaning the unit, Dowell-Schlumberger's standard operating procedure was to neutralize any acid residue that *may* have remained in the pipes by thoroughly rinsing the fin fan unit with water and soda ash solution. Dowell-Schlumberger then ran a series of pH tests to insure that no acid remained in the vessel prior to concluding the job and relinquishing control of the unit to

Dow Chemical. *November 20, 1995 Trial Transcript*, Vol. I of II, at 137-39. Dow Chemical then inspected Dowell-Schlumberger's work, including test results, to "insure" that the job was "safe" before removing the red "Danger" tag and issuing a "safe work permit" which would authorize a maintenance contractor to remove the blinds. *Id.*, at 131-36.

In light of the foregoing testimony and evidence, this Court's reliance upon Mr. White's *supposed* knowledge of prior "chemical leaks" as the basis for Merit's liability was clear error. The evidence shows that while White was aware of *water*, not "*chemicals*", occasionally being "trapped" in unit lines, *no* evidence was offered to show that either White, Dowell-Schlumberger, Dow Chemical or any other party had ever encountered leaking "chemicals" in the fin fan unit either during or following cleaning operations. Moreover, there is *no* evidence of either Dowell-Schlumberger or Dow Chemical previously permitting removal of blinds while *chemicals* remained in the lines.

The jury's negligence verdict – being supported by mere supposition and speculation – cannot stand. This Court, on rehearing, should reinstate the district court's entry of judgment as a matter of law, or, alternatively, affirm the trial court's grant of a new trial.

**2. Intervening change in applicable law.**

Any negligence in testing for or neutralizing chemicals utilized in clean-out operations would be that of Dowell-Schlumberger. Any negligence involved in (1) failing to detect the presence of chemicals in the unit

prior to removing blinds, or (2) failing to properly clean the site following the alleged spill, or (3) prematurely giving plaintiff's crew the "all clear," would be attributable to Dow Chemical.

At the time of trial, *Cavalier v. Cain's Hydrostatic Testing, Inc.*, 657 So.2d 1975 (La. 1995), was controlling law. *Cavalier* prohibited the jury from quantifying the fault of non-party tortfeasors; therefore, the jury was not asked to consider the fault of Dowell-Schlumberger, or Dow, or any other third party.[1] *Rec.* at 16-17. Indeed, plaintiff-appellant has argued that third-party fault cannot be utilized as a defense by Merit. *Plaintiff-Appellant's Original Brief*, at 35-36.

On May 9, 1997, approximately one week following argument in this case, the Louisiana Supreme Court held that recent amendments to Civil Code Article 2323[2] are *retroactive*, thus overruling *Cavalier*'s prohibition against quantification of third-party fault. *Keith v. United States*

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[1] Leave to add Dowell-Schlumberger as a party defendant was denied because joinder would have deprived the district court of diversity jurisdiction. *Rec.*, at 436-37. Dow Chemical was dismissed by summary judgment on the basis of statutory employer immunity. *Id.*, at 473-77. Dowell-Schlumberger has been made defendant in a parallel action in state court.

[2] LSA-C.C. art. 2323 reads, in pertinent part, as follows:

> A. In any action for damages . . . the degree or percentage of fault of ***all*** persons causing or contributing to the injury, death or loss *shall* be determined, ***regardless*** of whether the person is a party to the action or a non-party, and ***regardless*** of the person's insolvency, ability to pay, immunity by statute . . . or that the other person's identify [sic] is not known or reasonably ascertainable.

*Fidelity & Guaranty Company*, No. 96-CC-2075. 1997 WL 242555 (La., May 9, 1997). In the conduct of this trial, the district court and the parties followed controlling law (i.e., *Cavalier*). Under *Keith*, however, the jury is **required** to consider and quantify fault attributable to Dow Chemical and Dowell-Schlumberger. The jury's verdict is, therefore, tainted by legal error that wholly interdicts the verdict.

Because of this intervening legal error – which goes to the very heart of the jury's factual determinations concerning fault – the district court's grant of a new trial should be affirmed. In the alternative, this case should be remanded to the district court for further consideration in light of *Keith*. Accordingly, for the foregoing reasons, defendant-appellee respectfully requests that its Petition for Rehearing be granted.

By Attorneys,

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/s/ André G. Bourgeois
BORIS F. NAVRATIL (#9909)
ANDRÉ G. BOURGEOIS (#19298)

**Counsel for Defendant-Appellee,**
**J. E. Merit Constructors, Inc.**

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of this Petition for Rehearing on behalf of Defendant-Appellee, J. E. Merit Constructors, Inc., has this day been forwarded by U.S. Mail, properly addressed and postage prepaid, to all counsel of record, namely **Mr. John B. Lambremont, Sr.,** counsel for Plaintiff-Appellant-Respondent, John L. Davis, 619 Jefferson Highway, Suite 2-C, Baton Rouge, Louisiana 70806 (tele: 504-928-7524); **Mr. Leon A. Crist,** counsel for Intervenor/Plaintiff-Respondent, Law Offices of Ronald L. Ronzello, Suite 1704, One Galleria Boulevard, Metairie, Louisiana 70001 (tele: 504-846-4104); and **Honorable John V. Parker,** Chief Judge USDC, Middle District of Louisiana, Judge Presiding, Federal Courthouse Building, Florida Boulevard, Baton Route, Louisiana 70801.

Baton Route, Louisiana, this 25th day of June, 1997.

/s/ André G. Bourgeois
ANDRÉ G. BOURGEOIS
(#19298)

**UNITED STATES COURT OF APPEALS**
**FOR THE FIFTH CIRCUIT**

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**NO. 96-30671**

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**JOHN L. DAVIS,**

**Plaintiff-Appellant**

**FIDELITY & CASUALTY COMPANY OF NY,**

**Intervenor-Plaintiff-Appellant**

**v.**

**DOW CHEMICAL, ET AL,**

**Defendants**

**J. E. MERIT, a Division of Jacobs Engineering Group, Inc.,**

**Defendant-Appellee**

**MOTION FOR RECALL AND STAY OF MANDATE ON BEHALF OF DEFENDANT-APPELLEE, J. E. MERIT CONSTRUCTORS, INC.**

For reasons set forth in the attached Memorandum, Defendant-Appellee, J. E. MERIT CONSTRUCTORS, INC., moves that the mandate issued herein on July 23, 1997, be recalled and stayed during the pendency of its

application to the United States Supreme Court for a writ of certiorari.

By Attorneys,

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/s/ Boris F. Navratil
BORIS F. NAVRATIL
La. Bar Roll No.: 9909
**Counsel for J. E. Merit Constructors, Inc.**

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

---

NO. 96-30671

---

JOHN L. DAVIS,

Plaintiff-Appellant

FIDELITY & CASUALTY COMPANY OF NY,

Intervenor-Plaintiff-Appellant

v.

DOW CHEMICAL, ET AL,

Defendants

J. E. MERIT, a Division of Jacobs Engineering Group, Inc.,

Defendant-Appellee

**MEMORANDUM ON BEHALF OF J. E. MERIT CONSTRUCTORS, INC., IN SUPPORT OF MOTION FOR RECALL AND STAY OF MANDATE**

MAY IT PLEASE THE COURT:

The Court has reversed a judgment NOV entered by the court below, dismissing plaintiff's suit against Merit, as well as an alternative judgment granting a new trial to Merit. The Court has also denied Merit's timely petition for rehearing. Because the denial, entered on July 15, 1997, reached Merit's counsel with some delay, he was unable to file a motion to stay the issuance of mandate within the seven days prescribed by the rules. He did file

this motion at 8:45 a.m. on the eighth day, July 23, 1997. Nevertheless, the mandate issued and the motion was returned to counsel by the Clerk, having apparently not been brought to the Court's attention.

Merit intends to apply to the U.S. Supreme Court for a writ of certiorari. Its application will present a substantial question: Does the change in the controlling Louisiana law, effected by the May 9, 1997 decision of the Louisiana supreme court in *Keith v. United States Fidelity & Guaranty Co.*, 694 So.2d 180, entitle Merit to a new trial?

The *Keith* court decreed that a 1996 legislative amendment to Louisiana Civil Code Article 2323 is to be applied retroactively to all pending cases. Under the amended Article, the defendant in a damage suit such as this, is entitled to present evidence that negligence of other parties caused plaintiff's injury and to have the jury assess the degree of liability of such other parties. The court's earlier contrary decision handed down in *Cavalier v. Cain's Hydrostatic Testing, Inc.*, 657 So.2d 975 (La. 6/30/95), was expressly overruled in *Keith*.

Under *Keith*, Merit is entitled to do what it could not do when this case was tried in November, 1995: Have the jury assess the liability of parties such as the **Dow Chemical Company** – whose employees issued the safe-work permits to contract workers, directing them to do the work which caused the chemical spill and allegedly injured plaintiff; **National Maintenance Corporation** – whose employees may have been involved in the work which resulted in the spill; and **Dowell-Schlumberger** – whose employees allowed the acid which injured Mr. Davis to remain in piping from which they were obliged

to remove it. Thus, in a retrial of the case under the present law, Merit will be in a position to substantially limit, possibly eliminate entirely, its liability to Mr. Davis.

The United States Supreme Court has routinely granted certiorari, vacated appellate judgments and ordered a remand in cases in which controlling state law changed while they were pending on appeal. Indeed, this action is so common that the Court has resorted to using the acronym "GVR" for grant-vacate-remand orders. *Lords Landing Village Condominium Council v. Continental Insurance Company,* ___ U.S. ___, 117 S.Ct. 1731, 1732, 65 U.S.L.W. 3794 (June 2, 1997); *Lawrence v. Chater,* ___ U.S. ___, 116 S.Ct. 604, 606, 133 L.Ed.2d 545 (1946); *Thomas v. American Home Products, Inc.,* 516 U.S. ___, 116 S.Ct. 604, 133 L.Ed.2d 545 (1996); and *Huddleston v. Dwyer,* 322 U.S. 232, 64 S.Ct. 1015, 88 L.Ed. 1246 (1944).

Both *Thomas* and *Huddleston* are analogous to the case at bar inasmuch as the intervening change in controlling state law was brought to the appellate courts' attention for the first time in applications for a rehearing. In issuing its GVR order in *Huddleston,* the Court observed:

> It is the duty of the federal appellate courts, as well as the trial court, to ascertain and apply the state law where, as in this case, it controls decision. [Citation omitted.] And a judgment of a federal court ruled by state law and correctly applying that law as authoritatively declared by the state courts when the judgment was rendered, must be reversed on appellate review if in the meantime the state courts have disapproved of their former rulings and adopted different ones. "Until such time as the case is no longer sub judice, the duty rests upon federal

> courts to apply state law under the Rules of Decision statute in accordance with the then controlling decision of the highest state court." [Citation omitted.]

*Huddleston*, 64 S.Ct. at 1018.

Even Justice Scalia, who has expressed some criticism of the "excessive use of GVR orders," nevertheless agreed that the GVR order was properly granted in *Thomas*, stating that "the present case falls squarely within our historical use of the GVR mechanism." *Thomas*, 117 S.Ct. at 282 (Scalia, J., concurring).

Supreme Court precedent indicates that the question to be presented in Merit's application *is* a substantial question and may well receive favorable consideration. It would be both unjust and unnecessary – given Merit's status as a major national industrial contractor – to saddle it with an entered judgment of over $450,000, while its petition for certiorari is pending. Accordingly, Merit submits that requirements of FRAP Rule 41(b), that the prospective applicant for a writ of certiorari must show that the petition will present a substantial question and that there is good cause for a stay, have been satisfied in this case and the mandate heretofore issued should be recalled and stayed.

By Attorneys,

NAVRATIL, HARDY &
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Tele: (504) 379-7300

/s/ Boris F. Navratil
BORIS F. NAVRATIL
La. Bar Roll No.: 9909

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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NO. 96-30671

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JOHN L. DAVIS,
Plaintiff-Appellant

FIDELITY & CASUALTY COMPANY OF NY,
Intervenor-Plaintiff-Appellant

v.

DOW CHEMICAL, ET AL,
Defendants

J. E. MERIT, a Division Jacobs Engineering Group, Inc.,
Defendant-Appellee

## CERTIFICATE OF SERVICE

Undersigned counsel for mover hereby certifies that a copy of this Motion for Recall and Stay of Mandate with supporting Memorandum and Order has been faxed this day to (504)-928-7622, **Mr. John B. Lambremont, Sr.**, counsel for plaintiff John Davis, 619 Jefferson Hwy., Suite 2C, Baton Rouge, LA 70806; and transmitted by regular mail to counsel for Fidelity & Casualty Company of NY, Intervenor-Plaintiff-Appellant, **Mr. Leon A. Crist**, at his last known address, One Galleria Boulevard, Suite 1704, Metairie, LA 70001.

A copy has also been furnished to the **Honorable John V. Parker**, United States District Judge for the Middle District of Louisiana, Russell B. Long Federal Bldg.

and Courthouse, 777 Florida Street, Suite 355, Baton Rouge, LA 70801.

Baton Rouge, Louisiana, this 1st day of August, 1997.

/s/ Boris F. Navratil
BORIS F. NAVRATIL
La. Bar Roll No.: 9909

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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NO. 96-30671

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JOHN L. DAVIS,
Plaintiff-Appellant

FIDELITY & CASUALTY COMPANY OF NY,
Intervenor-Plaintiff-Appellant

v.

DOW CHEMICAL, ET AL,
Defendants

J E MERIT, a Division of Jacobs Engineering Group, Inc.,
Defendant-Appellee

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ORDER

Considering the foregoing Motion:

IT IS ORDERED that the mandate issued herein on July 23, 1997, be recalled and issuance of mandate stayed for thirty (30) days, per FRAP 41(b).

New Orleans, Louisiana, this ___ day of ___, 1997.

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UNITED STATES CIRCUIT
JUDGE

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UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

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NUMBER 96-30671

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JOHN L. DAVIS,
Plaintiff-Appellant

FIDELITY AND CASUALTY COMPANY OF NY,
Intervenor/Plaintiff-Appellant

v.

DOW CHEMICAL, ET AL.,
Defendants
J.E. MERIT, A DIVISION OF JACOBS ENGINEERING GROUP, INC.,
Defendant-Appellee

RESPONSE MEMORANDUM IN OPPOSITION TO MOTION FOR RECALL AND STAY OF MANDATE ON BEHALF OF DEFENDANT-APPELLEE J.E. MERIT CONSTRUCTORS, INC.

MAY IT PLEASE THE COURT:

J.E. Merit (hereinafter "Merit") contends that it will present a substantial question to the United States Supreme Court in its application for writs of certiorari to this Court's decision in the instant appeal, contending that the May 9, 1997 decision of the Louisiana Supreme Court in *Keith v. United States Fidelity and Guaranty Company*, 694 So.2d 180 (La. 1997), entitles Merit to a third trial on the merits in this case. Plaintiff-appellant John L. Davis shows that Merit's Motion for Recall and Stay of

the Mandate of this Court should be denied because Merit's writ application will not present any substantial question of controlling law, and because Merit failed to raise the issue of retroactivity of Acts 1996. First Ex. Sess., No. 3 in both the district court and in this Court during the pendency of the instant appeal, raising the retroactivity issue for the first time in its petition for rehearing, which was denied by this Court.

Plaintiff-appellant shows that the jury verdict in this case in Mr. Davis' favor was rendered November 21, 1995. On December 8, 1995, Merit filed a renewed motion for judgment as a matter of law, requesting a new trial in the alternative.

While Merit's post-trial motions were pending in the district court, the Louisiana Legislature enacted Acts 1996, First Ex. Sess., No. 3, amending Louisiana Civil Code Article 2323 to provide that in any action for damages the fault of all persons causing or contributing to the damages would be determined. These amendments to Louisiana Civil Code Article 2323 took effect April 16, 1996,[1] prior to the ruling on Merit's post-trial motions by the district judge. Despite the enactment of the amending legislation and the passage of the effective date of same during the pendency of Merit's post-trial motions in the district court. Merit did not submit to the district court for consideration any contention that the amending legislation should be given retroactive effect in the instant case so as to entitle Merit to a third trial herein.

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[1] See West LSA Civil Code Volume 9, Page 257 (1997), a copy of which is attached hereto as Exhibit "A".

Subsequently, on June 7, 1996, the district Judge granted both of Merit's post-trial motions, vacating the jury's verdict and rendering judgment in favor of Merit, dismissing Mr. Davis' suit. The instant appeal followed.

At no time during the instant appeal prior to the petition for rehearing did Merit raise the issue of retroactivity of Acts 1996. First Ex. Sess. No. 3, amending Louisiana Civil Code Article 2323. During the pendency of this appeal, on November 15, 1996, the Louisiana Supreme Court granted writs in the *Keith* case cited *supra*, see 682 So.2d 745 (La. 1996). On May 9, 1997, the Louisiana Supreme Court handed down its opinion in *Keith, supra*, holding that the amendments to Louisiana Civil Code Article 2323 enacted by Acts 1996, First Ex. Sess., No. 3, were procedural and thus could be applied retroactively in Mr. Keith's suit, *Keith supra*, at 183. Merit's petition for rehearing filed herein on June 25, 1997, raised the retroactivity argument for the first time in this litigation.

Plaintiff-appellant John L. Davis shows that Merit's writ application to the United States Supreme Court will not present a substantial question because under federal procedural law, appellate courts do not entertain issues that were not presented to the trial court and are presented for the first time on appeal, see this Court's opinions in *Garcia v. Excel Corporation*, 102 F.3d 758 (5th Cir. 1997); *Blanchard v. Forrest*, 71 F.3d 1163 (5th Cir. 1996); *Reynolds Metals Company v. Westinghouse Electric Corporation*, 758 F.2d 1073 (5th Cir. 1985); *Bliss v. Equitable Life Assurance Society of the United States*, 620 F.2d 65 (5th Cir. 1980); *Capps v. Humble Oil and Refining Company*, 536 F.2d 80 (5th Cir. 1976); and *Wolf v. Frank*, 477 F.2d 467 (5th Cir. 1973). Defendant-appellee Merit had every opportunity

to contend in the district court the 1996 amendments to Louisiana Civil Code Article 2323 should be given retroactive application herein, since as of the effective date of the amending legislation, the district judge had not yet rendered his decision on Merit's pending post-trial motions and did not rule until June 7, 1996. Under the law of this circuit cited above, Merit is precluded from raising in the instant appeal the retroactivity argument which it failed to argue in the district court below.

Likewise, Merit failed to raise the retroactivity argument before this Court during the pendency of the instant appeal, even though the amendments to Louisiana Civil Code Article 2323 were already law prior to the noticing of this appeal, and despite the fact that during the pendency of the appeal the Louisiana Supreme Court granted writs in the *Keith* case cited *supra*. Under the law of this circuit, this Court will not consider contentions raised for the first time on a petition for rehearing, see *Federal Deposit Insurance Corporation v. Massingill*, 30 F.3d 601 (5th Cir. 1994); *Dean v. Dean*, 837 F.2d 1267 (5th Cir. 1988); and *Vas Borralho v. Keydril Company*, 710 F.2d 207 (5th Cir. 1983). Since the 1996 amendments to Louisiana Civil Code Article 2323 were already law when this appeal was instituted and the Louisiana Supreme Court granted writs to entertain the retroactivity of said amendments during the pendency of this appeal, defendant-appellee Merit had every opportunity to raise the retroactivity argument during the pendency of the instant appeal, but failed or declined to do so. Whether or not Merit knew the Louisiana Supreme Court granted writs in *Keith, supra*, does not excuse Merit's failure to timely raise the retroactivity issue in this court, see *Norgaard v. DePuy*

*Orthopedics, Inc.*, ___ F.3d ___. No. 96-3892 (7th Cir., 7/31/97), wherein the Seventh Circuit held that ignorance of the Supreme Court's docket did not justify a litigant's untimely action in the district court.[2] Thus, under the law of this circuit cited above, Merit is precluded from raising the retroactivity question for the first time in its petition for rehearing.

Plaintiff-appellant John L. Davis further shows that under the *Erie* doctrine, the Louisiana Supreme Court's decision in *Keith, supra,* is not binding or controlling in the federal courts, as per the precise language and reasoning applied by the Louisiana Supreme Court in *Keith.* Under the *Erie* doctrine, federal courts sitting in diversity apply the substantive law of the forum state and federal procedural law. *Hanna v. Plumer,* 380 U.S. 460, 85 S.Ct. 1136, 14 L.Ed.2d 8 (1965); *Erie Railroad Co. v. Tompkins,* 304 U.S. 64, 58 S.Ct. 817, 85 L.Ed. 1188 (1938), see also this Court's opinions in *Exxon Corporation v. Burglin,* 42 F.3d 98 (5th Cir. 1995), *Carter v. General Motors Corporation,* 983 F.2d 40 (5th Cir. 1993); *Douglas v. NCNB Texas National Bank,* 979 F.2d 1128 (5th Cir. 1992); *Walker v. Federal Deposit Insurance Corporation,* 970 F.2d 114 (5th Cir. 1992); *Cates v. Sears, Roebuck & Co.,* 928 F.2d 679 (5th Cir. 1991); *Rosenberg v. Celotex Corporation,* 767 F.2d 197 (5th Cir. 1985); and *Maxey v. Freightliner Corporation,* 665 F.2d 1367 (5th Cir. 1982). The Louisiana Supreme Court stated

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[2] The Seventh Circuit stated that where a lawyer did not know that a key issue in his case was pending before the Supreme Court, this was "inexcusable," and the judgment against his client could not be reopened in light of the Supreme Court's subsequent decision.

explicitly in *Keith, supra,* that it would permit a retroactive application of the 1996 amendments to Louisiana Civil Code Article 2323 in that case because said amendments were procedural, *Keith, supra,* at 183. Under the case law cited above, state procedural law does not apply in federal diversity cases, and therefore *Keith* is inapplicable herein.

Moreover, as per this Court's opinion in *Shipes v. Trinity Industries,* 31 F.3d 347 (5th Cir. 1994), when in federal court a procedural matter has been properly decided under the old rule, and a new procedural rule is subsequently enacted while the ultimate resolution of the case is still pending, no reversal is required. See *Shipes, supra,* at 348, citing *Landuraf v. USI Film Prods.*, 511 U.S. 244, 114 S.Ct. 1483, 128 L.Ed. 2d 229 (1994). Thus, even to the extent that *Keith, supra,* might constitute pertinent procedural law, which is denied, this Court would still not be obliged to apply *Keith* retroactively herein as urged by Merit under *Shipes, supra,* see also *Cockrum, Welch v. Johnson,* 934 F.Supp. 1417 at 1449 (E.D. Texas 1996).

For the above reasons, plaintiff-appellant John L. Davis shows that Merit's writ application to the United States Supreme Court will not present any substantial question of controlling law, and thus prays that Merit's

Motion for Recall and Stay of the Mandate of this Court be denied.

BY ATTORNEY:

/s/ John B. Lambremont, Sr.
JOHN B. LAMBREMONT, SR.
(#7942)
Attorney for Plaintiff-Appellant,
John L. Davis
619 Jefferson Highway, Suite 2-C
Baton Rouge, LA 70806
(504) 928-7524

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing has been served to Boris F. Navratil, Navratil, Hardy & Bourgeois, Suite 800, City Plaza, 445 North Boulevard, Baton Rouge, LA 70821, attorney for defendant-appellee, and Leon A. Crist, Law Offices of Ronald L. Ronzello, Suite 1704, One Galleria Boulevard, Metairie, LA 70001, attorney for Fidelity and Casualty Company of New York, intervenor-plaintiff - appellant, by depositing same in the U.S. Mail, certified, postage pre-paid, this 14th day of August, 1997.

/s/ John B. Lambremont, Sr.
John B. Lambremont, Sr.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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No. 96-30671

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JOHN L DAVIS

Plaintiff - Appellant

FIDELITY & CASUALTY COMPANY OF NY

Intervenor-Plaintiff - Appellant

v.

DOW CHEMICAL, ET AL

Defendants

J E MERRITT, a Division of Jacobs Engineering Group, Inc

Defendant - Appellee

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Appeal from the United States District Court for the Middle District of Louisiana, Baton Rouge

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(Filed Aug. 25, 1997)

ORDER:

( ) The motion of appellee for
( ) stay (X) recall and stay of the issuance of the mandate pending petition for writ of certiorari is DENIED.

( ) The motion of appellee for
( ) stay ( ) recall and stay of the issuance of the

mandate pending petition for writ of certiorari is GRANTED to and including _____, the stay is in force until the final disposition of the case by the Supreme Court, provided that the certificate of the Clerk of the Supreme Court that the certiorari petition has been filed is also filed with this court within the time stated above. The clerk shall issue a mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of this stay unless the certificate is filed with the clerk of this court within that time.

/s/ Henry A. Politz
UNITED STATES CIRCUIT
JUDGE